IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EVA G. ROMPOLA,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
LEHIGH VALLEY HOSPITAL,	:	**No. 03-2993**
Defendant.	:	

MEMORANDUM AND ORDER

Schiller, J. **July 6, 2004**

Plaintiff Eva Rompola brought suit against her former employer, Defendant Lehigh Valley Hospital, for sex, national origin, and age discrimination and retaliatory discharge in violation of Title VII of the 1964 Civil Rights Act ("Title VII"), 42 U.S.C. § 2000e, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 629. Defendant moved for summary judgment on all of the claims in Plaintiff's complaint. Subsequently, Plaintiff voluntarily withdrew all claims in her complaint except for her retaliatory discharge claims under Title VII and the ADEA. Thereafter, this Court granted summary judgment on the retaliation claims in favor of Defendant. Presently before the Court is Defendant's petition for costs and fees pursuant to Title VII, 42 U.S.C. § 2000e-5(k), and the ADEA, 29 U.S.C. § 626(b). For the reasons set forth below, I deny Defendant's petition.

I. BACKGROUND

Plaintiff is a Hungarian-born registered alien who was fifty-one years of age when the events at issue occurred.[1] After Defendant hired her as an emergency room nurse, Plaintiff's employment record was littered with disciplinary actions and complaints regarding her performance and treatment

[1] The facts of this case are set out at length in this Court's Memorandum and Order dated March 11, 2004, granting summary judgment. (Memo. and Order dated March 11, 2004 at 1-6.)

of patients. Perceiving these disciplinary actions to be discrimination based on sex, national origin, and age, Plaintiff retained an attorney who wrote a letter to Defendant on her behalf and filed an EEOC complaint. After several months and other patient-related incidents, Defendant conducted an investigation into the most recent incidents on Plaintiff's employment record and ultimately terminated her. Plaintiff brought suit in this Court alleging sex, national origin, and age discrimination as well as retaliatory discharge.

Copious discovery was taken and Defendants thereafter filed a summary judgment motion, which contained volumes of records on Plaintiff's employment history. After Defendant filed its summary judgment motion on all counts, Plaintiff withdrew her discrimination claims and pursued only the retaliatory discharge claim. This Court granted summary judgment in favor of Defendant after determining that Plaintiff could not prove the causal link between her termination and her protected activity. Defendant, as the prevailing party, now moves the Court to award attorneys' fees and costs under Title VII and the ADEA.

II. STANDARD FOR AWARD OF ATTORNEYS' FEES AND OTHER COSTS

A. Award of Attorneys' Fees and Other Costs to Prevailing Defendants under Title VII

Under Title VII, 42 U.S.C. § 2000e-5(k), reasonable attorneys' fees and other costs may be granted in the district court's discretion to a prevailing defendant "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978); *see also EEOC v. L.B. Foster*, 123 F.3d 746, 751 (3d Cir. 1997). Similarly, a district court may award fees when, after it

becomes clear that the claims are frivolous, unreasonable, or without foundation, plaintiff continues to litigate. *Id*. at 422. "'Frivolous, unreasonable, or without foundation,' in this context, implies 'groundless . . . rather than simply that the plaintiff has ultimately lost his case." *L.B. Foster*, 123 F.3d at 751 (*quoting Christiansburg Garment Co.*, 434 U.S. at 412).

While a plaintiff's subjective bad faith is not a prerequisite for an award of fees under Title VII, implicit in the determination is "that plaintiff knew or should have known the legal or evidentiary deficiencies of his claim." *Brown v. Borough of Chambersburg* 903 F.2d 274, 277 (3d Cir. 1990); *cf. Barnes Found. v. Township of Lower Merion*, 242 F.3d 151, 156 (3d Cir. 2001) (stating that "relevant standard is objective"). Because fees under Title VII are assessed only against the losing party and not the losing party's attorney, *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 504 (3d Cir. 1991), many courts will not award fees where plaintiff cannot be said to be personally accountable for the frivolous nature of her case. *Solomen v. Redwood Advisory Co.*, 223 F. Supp. 2d 681, 688 (E.D. Pa. 2002); *Hutter v. Southeastern Pa. Transit Auth.*, Civ. A. No. 99-4879, 2000 U.S. Dist. LEXIS 9041, at *10, 2000 WL 873319, at *4 (E.D. Pa. June 23, 2000); *Murray v. Southeastern Pa. Transit Auth.*, Civ. A. No. 96-7971, 1998 U.S. Dist. LEXIS 18039, at *5-6, 1998 WL 778325, at *2 (E.D. Pa. Nov. 9, 1998); *see also Hicks v. Arthur*, 891 F. Supp. 213, 215 (E.D. Pa. 1995), *aff'd*, 91 F.3d 123 (3d Cir. 1996). "Typically, a discharged plaintiff genuinely believes he has been wronged but must depend on his attorney to assess whether there is a legally cognizable or supportable claim." *Murray*, 1998 U.S. Dist. LEXIS 18039, at *5.

Moreover, the Third Circuit has cautioned that awards of "attorney's fees [to a prevailing Title VII defendants] are not routine, but are to be only sparingly awarded." *L.B. Foster*, 123 F.3d at 751 (*citing Quiroga*, 934 F.2d at 503). In order to determine whether to award a prevailing Title

VII defendant attorneys' fees, a court must look at "several factors including '(1) whether the plaintiff established a prima facie case; (2) whether the defendant offered to settle; . . . (3) whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits'"; (4) "whether the issue was one of first impression;" and (5) "whether there was a real threat of injury to the plaintiff." *Id.* (discussing first three factors (citations omitted)); *see also Barnes Found.*, 242 F.3d at 158 (discussing additional factors). These factors are not exclusive; rather, they are guideposts to aid in determining on a case-by-case basis whether fees should be awarded. *L.B. Foster*, 123 F.3d at 751.

The Supreme Court has cautioned that "it is important that a . . . court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg*, 434 U.S. at 421-22. Furthermore, several courts have specifically held that in cases, such as this one, where the defendant prevails on its summary judgment motion, "the grant of summary judgment in defendant's favor does not necessarily mean the action was frivolous for awarding attorney's fees" and that "the standard for finding frivolity or a lack of foundation therefore must require something beyond that which is required for granting . . . a motion for summary judgment." *Solomen*, 223 F. Supp. 2d at 684 (citations omitted); *see also Whiteland Woods v. Township of West Whiteland*, Civ. A. No. 96-8086, 2001 U.S. Dist. LEXIS 12210, at *17, 2001 WL 936490, at *5 (E.D. Pa. Aug. 14, 2001); *Tuthill v. Consol. Rail Corp.*, Civ. A. No. 96-6868, 1998 U.S. Dist. LEXIS 8863, at *11-12, 1998 WL 321245, at *4 (E.D. Pa. June 18, 1998); *Izquierdo v. Sills*, Civ. A. No. 97-495, 1999 U.S. Dist. LEXIS 20820, at *8, 1999 WL 142735, at *2-3 (D. Del. Dec. 21, 1999); *cf. Khan v. Gallitano*, 180 F.3d 829, 837 (7th Cir. 1999) ("There is a significant

difference between making a weak argument with little chance of success . . . . and making a frivolous argument with no chance of success . . . . It is only the latter that permits defendants to recover attorney's fees."). In order to determine whether fees should be awarded after the grant of a summary judgment motion, courts consider whether careful and detailed consideration was needed in order to grant summary judgment and whether there was at least some basis in law for plaintiff's claims. *Tuthill*, 1998 U.S. Dist. LEXIS 8863, at *11-12 (E.D. Pa. June 18, 1998) ("When claims have been disposed of by a motion for summary judgment after 'careful consideration' by the court, the action most likely was not frivolous or vexatious." (*quoting Hughes v. Rowe*, 449 U.S. 5, 16 (1980))); *Whiteland Woods,* 2001 U.S. Dist. LEXIS 12210, at *17 (*quoting Tuthill*); *Izquierdo,* 1999 U.S. Dist. LEXIS 20820, at *8, 10 (*citing Tuthill* and holding plaintiff's claims were not frivolous as "[d]etailed fact, specific inquiries into the various claims was needed")).

B. Award of Attorneys' Fees and Other Costs to Prevailing Defendants under ADEA

The standard for an award of attorneys' fees and other costs to prevailing defendants under the ADEA is not as well established as the standard under Title VII. However, "each circuit which has addressed this issue has found that a district court may award attorney's fees to a prevailing defendant if the defendant establishes that the plaintiff litigated in bad faith." *Cesaro v. Thompson Publ'g Group,* 20 F. Supp. 2d 725, 726 (D.N.J. 1998) (*citing Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1437 (11th Cir. 1998) and discussing several circuit courts' decisions on point). Recently, in a footnote to a published opinion, the Third Circuit noted that it would be similarly inclined to find that a showing of bad faith is required to award prevailing defendants attorneys' fees under the ADEA. *Wastak v. Lehigh Valley Health Network,* 333 F.3d 120, 133 n.7 (3d Cir. 2003)

(citing *Cesaro* and *Turlington* for proposition that employer-defendant in ADEA suit is permitted to recover attorneys' fees under common law exception for claims brought in bad faith).

III. DISCUSSION

Defendant contends that an award of attorneys' fees and costs is warranted in this case because: (1) Plaintiff did not establish a prima facie case of discrimination or retaliation and summary judgment was granted in Defendant's favor; (2) Defendant never offered to settle; (3) Plaintiff withdrew her claims of discrimination and none of Plaintiff's claims went to trial; and (4) Plaintiff knew or should have known that her claims were baseless prior to the time at which she filed this lawsuit. Despite these contentions, I heed the Third Circuit's admonishment that fees and other costs to a prevailing defendant should "only sparingly awarded" and conclude that an award in this case is not warranted. *L.B. Foster*, 123 F.3d 750 (*quoting Quiroga* 934 F.2d at 503).

While this Court ultimately found that Plaintiff did not establish her prima facie case, a detailed analysis was conducted before doing so. *Tuthill*, 1998 U.S. Dist. LEXIS 8863, at *8; *Izquierdo*, 1999 U.S. Dist. LEXIS 20820, at * 10. This Court's ultimate conclusion that Plaintiff could not prove the casual link between her termination and protected activity was based upon close review of the copious records provided by Defendant of Plaintiff's employment history. After this review, the Court held that "Plaintiff's employment problems that occurred after notifying Defendant of her intention to file an EEOC charge were consistent with the problems she had before this notification." (Memo. and Order dated Mar. 11, 2004, at 12.) In making this determination, this Court relied on the Third Circuit's advisement that:

> While it is possible that a manager might make a poor evaluation to

> retaliate against an employee for making an EEOC charge, still it is important that an employer not be dissuaded from making what he believes is an appropriate evaluation by a reason of a fear that the evaluated employee will charge that the evaluation was retaliatory. In this regard, we are well aware that some employees do not recognize their deficiencies and thus erroneously may attribute negative evaluations to an employer's prejudice. Accordingly, in a case like this in which the circumstances simply cannot support an inference that the evaluations were related to the EEOC charges, a court should not hesitate to say so.

Shaner v. Synthes, 204 F.3d 494, 505 (3d Cir. 2000). Although this Court did not hesitate to find that Plaintiff did not demonstrate a causal link, this Court arrived at that conclusion after careful consideration of the record and cannot now conclude that Plaintiff's claims had no basis whatsoever. *Christiansburg*, 434 U.S. at 421 (cautioning courts to avoid engaging in post hoc reasoning in awarding fees where plaintiff does not prevail on his case); *see also Hughes*, 449 U.S. at 15-16 (holding that "[a]llegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, 'groundless' or 'without foundation' as required by *Christiansburg*"); *L.B. Foster*, 123 F.3d at 752 (noting reversal of fee award is warranted where district court found that there was "some basis" for plaintiff's claims); *Tuthill*, 1998 U.S. Dist. LEXIS 8863, at *12 (E.D. Pa. 1998) (holding that fees are not necessarily appropriate even if the plaintiff had only "a shadow of evidence" to support his claims); *Izquierdo*, 1999 U.S. Dist. LEXIS 20820, at *7, 11 (holding that detailed treatment of plaintiff's claims indicates that his claims were not frivolous).

Moreover, the Court's detailed analysis of Plaintiff's claims also cuts against Defendant's argument that Plaintiff knew or should have know that her claim was without foundation at the outset of the case. From the institution of this action, Plaintiff's counsel sought production of Plaintiff's employment record, and, once discovery was conducted, Plaintiff and her counsel

withdrew her discrimination claims, undoubtedly concluding that it would not be prudent to continue to litigate these claims. Such conduct demonstrates the reasonableness of Plaintiff and her counsel, rather than suggesting that she pursued this case in bad faith or without foundation. *See Christiansburg*, 434 U.S. at 422 ("[P]laintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."). An award to Defendant is not warranted where Plaintiff and her counsel chose to pursue her retaliation claim when Plaintiff genuinely believed, as the record demonstrated, that she had been wrongfully terminated, (Memo. and Order dated Mar. 11, 2004 at 11). *Murray*, 1998 U.S. Dist. LEXIS 18039, at *4-5. This Court ultimately concluded that although Plaintiff may have felt her termination was wrongful, it was not because of her protected activity. (Memo. and Order dated Mar. 11, 2004 at 10-12 (*quoting Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108-09 (3d Cir. 1997)). Accordingly, although Plaintiff's belief that her termination was retaliatory was ultimately mistaken, this Court will not award attorneys' fees and costs to Defendant as the record does not demonstrate that Plaintiff pursued her case without foundation or in bad faith. Therefore, Defendant's petition for attorneys' fees and costs is denied. An appropriate Order follows.

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Defendant.	**:**	

ORDER

AND NOW, this **6th** day of **July**, **2004**, upon consideration Defendant's Petition for Attorneys' Fees and Costs, Plaintiff's response thereto, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Defendant's Petition for Attorneys' Fees and Costs (Document No. 44) is **DENIED**.

BY THE COURT:

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Berle M. Schiller, J.